

***United States Court of Appeals
for the Second Circuit***



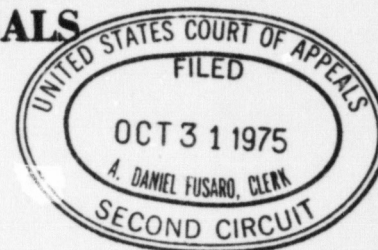
**APPELLANT'S
REPLY BRIEF**

75-7424

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



VINCENT K. HILTON and EDWARD G. HILTON, as Trustees under Indenture dated May 9, 1958 for the benefit of VINCENT K. HILTON; VINCENT K. HILTON and EDWARD G. HILTON, as Trustees under Indenture dated May 9, 1958 for the benefit of MARY G. HILTON; and EDWARD G. HILTON,

Plaintiffs-Appellants,

against

BROWN BROTHERS HARRIMAN & CO., et al.,

Defendants,

FIRST NATIONAL CITY BANK,

Defendant-Appellee.

APPEAL FROM UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

	Page
Table of Cases, Statutes and Other Authorities	ii
Reply to Citibank's I	1
Reply to Citibank's II	6
Reply to Citibank's III	7
Reply to Citibank's IV and VI	7
Reply to Citibank's V	9
Conclusion	13
Addendum	I - VII

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES	Page
<u>Bassett v. Spofford</u> , 45 N.Y. 387 (1871)	9
<u>Bischoff v. Yorkville Bank</u> , 218 N.Y. 106, 114 (1916)	13
<u>Effron v. Hale</u> , 200 Misc. 966 (Sup.Ct. 1951)	9
<u>Hamlin v. Sears</u> , 82 N.Y. 327 (1880)	9
<u>Hartford Acc. & Ind. Co. v. Walston & Co.</u> , 21 N.Y. 2d 219 (1967)	9
<u>King v. Richardson</u> , 136 F.2d 849, 864 (CCA 4th, 1943) cert.den. 320 U.S. 777 (1942)	12
<u>Soma v. Handrulis</u> , 277 N.Y. 223 (1938)	9
<u>Whiting v. Hudson Trust Co.</u> , 234 N.Y. 394	7
STATUTES	
Banking Law § 9	5
General Business Law § 359-i	2
§ 359-j	2
§ 359-l	2, 3, 4, 5 and Addendum V
Article 23-C	2
Laws 1937, ch. 344	2, 3 and Addendum III-IV
U.C.C. § 3-117	9
§ 3-304(2)	2
Uniform Fiduciaries Act - complete	Addendum I-II
§ 1	2
§ 3	2

Uniform Fiduciaries Act § 4	1, 3, 4, 5
§ 9	2
OTHER AUTHORITIES	
<u>Bogert, Trusts and Trustees</u> (2d ed.) § 871, p. 93	9
5 <u>N. Y. Jur. Banks and Trust Companies</u> §§435, 436	5
N. Y. Legislative Index 1930, pp. 58, 161	2
<u>Restatement Trusts 2d</u> § 184, comment b	8
§ 321	11
4 <u>Scott on Trusts</u> (3rd ed.) pp. 2410-2411	5
p. 2510	10
S. Int. No. 894, A. Int. No. 675, 1930	2
Stevens, Dean Robert S., letter to Governor	3, 7 and Add-
	endum VI-VII

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FIRST NATIONAL CITY BANK,
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REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

Reply to Citibank's I

We believe that the New York law has never been to the effect stated by Citibank, that a bank need not inquire behind a trustee's endorsement of a check. The common law is to the contrary, and is sought to be changed by section 4 of the Uniform Fiduciaries Act, as we show at pages 6 - 8 of our main brief. At this point, since Citibank appears to rely on section 4 of the

Uniform Fiduciaries Act and section 359-1 of the General Business Law, which was taken from section 9 of the Uniform Fiduciaries Act, a brief review of certain legislative history in New York is in order.

The Uniform Fiduciaries Act is reproduced in its entirety at pages I - II of the Addendum to this reply brief. It was introduced (except for §§ 12 - 16) in the New York Legislature in 1930 as S.Int.No. 894 and A.Int.No. 675. It passed the Assembly, but was not reported out of the Senate committee (N.Y. Legislative Index, 1930, pp.58, 161). However, sections 1 and 3 of the Uniform Fiduciaries Act (which contain definitions and relate to the obligations of a corporation transferring its stock in the name of a fiduciary) were in effect adopted by Laws of 1937, ch. 344, and became sections 359-i and 359-j of the General Business Law. A picture of L. 1937, ch. 344 is set forth at pages III - IV of the Addendum. Section 359-i is still in effect; section 359-j was repealed in 1959, but was incorporated in Article 23-C of the General Business Law. Then in 1948, the Legislature added section 359-1 to the General Business Law, which is close to, although not as broad as section 9 of the Uniform Fiduciaries Act. A picture of section 359-1 is at page V of the Addendum. Section 359-1 covers the liability of a bank when a fiduciary deposits trust funds in his personal account in the bank.

When the Legislature passed ch. 344 of the Laws of 1937, Dean Robert S. Stevens wrote to the Governor advocating signature. The letter is contained in the bill jacket for the law, and is reproduced at pages VI - VII of the Addendum. Dean Stevens states that the "entire Fiduciaries Act was before the Legislature" in 1930; that the Act was "based upon the principle that persons dealing with fiduciaries should not be charged with constructive notice that certain acts of the fiduciaries are breaches of trust; that, in the ordinary course of banking and commercial transactions, it is not practicable to make inquiry into the conduct of fiduciaries; and that persons dealing with fiduciaries should not be bound to inquire into their trust relationship and supervise them in the performance of their duties."

This same thought seems to underlie the reasoning of Judge Frankel below. The writer of this brief has the greatest respect for the erudition of Dean Stevens, who was one of his law professors, and of Judge Frankel. However, the New York Legislature did not agree with their views and refused to exempt banks from the long established common law of trusts except in a few specific situations, such as that contained in section 359-1 of the General Business Law relating to a deposit by a fiduciary of trust funds in his own account. Specifically, the Legislature refused to enact section 4 of the Uniform Fiduciaries Act which covers the situation here, a transfer by a fiduciary to a third person of a

negotiable instrument payable to the trust; thus, it left the common law in effect in New York, as Scott points out (see our main brief, pp. 6 - 8).

All of the authorities cited by Citibank in pages 6 - 13 of its brief involve situations where a fiduciary drew funds from the trust account and deposited them in his account or paid his debt with them, the situation covered by section 359-1 of the General Business Law. These same authorities were cited by Citibank in the District Court below. While we have taken issue with the decision below, we note that Judge Frankel, although holding with Citibank, did not cite Citibank's authorities, obviously recognizing that they were irrelevant. Plaintiffs did not claim below and do not claim here that there are any authorities in point. However, the common law of trusts would make Citibank liable, and the Court below was not justified, in effect, in legislating section 4 of the Uniform Fiduciaries Act into law.

The distinctions between the various situations involved in this area are important. It is one thing for a fiduciary to draw funds from the trust account and pay them to himself. For example, how else can he pay his commissions? It is quite another thing for the fiduciary to endorse to a third person a check payable to a trust. There's something fishy about this; perhaps the fiduciary is trying to hide something; perhaps he could not make the transfer in proper form, as here, where Bush did not maintain a bank account for the

trusts (Brown Brothers Harriman & Co. was the depository and handled the receipt and disbursement of the trust funds). In an analagous situation, where a corporate president draws a corporate check on Bank A to his own order and with it pays his debt to Bank A, Bank A is held to be on inquiry (see: General Business Law § 359-1; Banking Law § 9; U.C.C § 3-304(2); 5 N.Y.Jur. Banks and Trust Companies §§ 435, 436; 4 Scott on Trusts (3rd ed.) pp. 2410-2411); but if the corporate president had deposited the check in his account in Bank B (no duty of inquiry - General Business Law § 359-1), and then had drawn his check on that account in payment of his debt to Bank A, there can be no doubt that Bank A would have no duty of inquiry. The result of each transaction is the same, but the difference in method of execution leads to an entirely different legal conclusion. These are not distinctions "without a difference" or elevating "form over substance" (Citibank's brief, p. 10). These are age old distinctions drawn in the common and statutory law.

Citibank's discussion of plaintiffs' authorities, at pages 13 - 20 of its brief, continues to rely on rules of law such as General Business Law § 359-1 and Uniform Fiduciaries Act § 4, which just do not apply here.

We are left with a case governed by no statute, to which no exception to the general rules applicable to trusts has ever been announced in New York. We respectfully submit that the United

States Courts should not legislate New York law which the New York Legislature has rejected.

Reply to Citibank's II

This case does not involve Citibank's liability as the bank of deposit for Bacon, Stevenson & Co. Citibank here was both the drawee or bank of deposit for Bacon, Stevenson & Co., and the endorsee or collecting bank for Inter Mundis. It is Citibank's liability in the latter capacity which concerns us. Had the checks been endorsed for deposit to the account of the drawees, plaintiff trusts, Citibank would have declined to accept them because it had no account for the trusts. If it accepted them for any other account, other than one of Bush, and if the argument of plaintiffs has merit, it should have held the proceeds for plaintiffs, and it should now pay the proceeds over. In neither situation would it be violating any duty it owed to Bacon, Stevenson & Co., and any discussion of its possible liability to its customer, Bacon, Stevenson & Co. is irrelevant. Were Citibank's argument to have validity, that it had to honor its depositor's directions, it could escape liability even if it had actual knowledge of Bush's theft. The obligation of a bank to its depositor, to honor checks properly negotiated, does not negate the law of conversion and of trusts.

Reply to Citibank's III

The quotation of Citibank from Whiting v. Hudson Trust Co., 234 N.Y. 394, is probably copied in every brief submitted to every court by every bank charged with mishandling funds. Note that Dean Stevens, in urging the adoption of the Uniform Fiduciaries Act, made a similar argument (Addendum, pp. VI-VII). We have no statistics on the number of checks payable to trusts which are diverted by endorsement to third parties. There cannot be many of them, because neither counsel nor the Court below found any cases in point. Let us not repeal the law of trusts in order to let banks deal willy-nilly with funds they handle, in careless disregard of the rights of others.

Reply to Citibank's IV and VI

As we noted at pages 13 - 14 and 18 of our main brief, the delegation of authority to Bush to act alone neither authorized him to steal the trust funds nor bars plaintiffs from claiming against him and a bank which aided him. Again, the Court is asked to note that such delegation was by the settlers; the fact that the settlers were also trustees and beneficiaries did not mean an "abdication" of their duties (duties to whom, to themselves?). The delegation accomplished what could have been done when the trusts were set up, that is, the settlers could originally have appointed Bush sole trustee.

Would that have given Bush license to steal, and would that have given permission to Citibank to close its eyes to a misappropriation of trust funds?

Citibank quotes from Restatement Trusts 2d § 184, but stops short of quoting Comment b thereof, which reads:

"By the terms of the trust, where there are several trustees, it may be provided that one or more of the trustees may be permitted to have exclusive possession or control of the whole or a part of the trust property."

That was the situation here. The settlors of the trusts amended the indentures to give Bush authority to act alone (Stipulation ¶ 6 - A10; this paragraph reads that such authority was given by the then trustees; actually they were the settlors, who were also co-trustees.) The situation was the same as if the settlors, when the trusts were created, gave such authority to Bush. This was not an "abdication"; this was a grant of authority, permissible under the trust indentures. Paragraph TWENTIETH of the indentures reads:

"The Settlor expressly reserves the right to amend, modify and revoke, in whole or in part, this trust at any time during the settlor's life."

Citibank does not talk in terms of contributory negligence, preclusion, waiver or estoppel, and no such defense is alleged in its

answer. Suffice it to say that even if the Hiltons were negligent in delegating sole authority to Bush (and we stoutly deny this), their fault does not insulate Citibank from liability. One who converts property cannot plead as a defense the negligence of the owner. Hartford Acc. & Ind. Co. v. Walston & Co., 21 N.Y.2d 219 (1967); Bassett v. Spofford, 45 N.Y. 387 (1871); Hamlin v. Sears, 82 N.Y. 327 (1880); Soma v. Handrulis, 277 N.Y. 223 (1938); Effron v. Hale, 200 Misc. 966 (Sup.Ct.1951). Nor are the present trustees precluded from maintaining this action because of any claim of misconduct by their predecessors (at this time, Vincent and Edward Hilton are trustees; when the indentures were amended, Vincent and Mary Hilton, and Bush, were trustees). As stated in Bogert, Trusts and Trustees (2d ed.) §871, p. 93:

"The action to procure relief for a breach of trust may be brought on behalf of the cestuis by a successor of the wrongdoing trustee, or by a co-trustee, or the wrongdoing trustee may himself sue a third party who participated in the breach."

Reply to Citibank's V

The reference to U.C.C. §3-117 does not seem to add anything to the argument. Bush may have had authority to negotiate the checks for a proper purpose, like sending them to Brown Brothers

Harriman & Co., the trusts depository, for deposit. He had no authority to make them available to Inter Mundis.

Nor does article THIRTEENTH of the trust indentures rescue Citibank. This is a boiler plate provision customarily found in trust indentures and in wills, the intent of which is to make it easy for the trustee or executor to manage the affairs of the trust or estate without having to prove to third parties his right to do so. Provisions like this were originally intended to overcome the common law rule, which is stated in Scott on Trusts (3rd ed.) §321, p. 2510:

"* * * that a purchaser of trust property is liable in equity to the beneficiaries for the purchase price, although the trustee had made the sale in the proper exercise of a power of sale and although the purchaser had paid the purchase money to the trustee, unless the money so paid was properly applied by the trustee for the purposes of the trust."

Scott states further (idem.):

"Where the rule prevails it is almost the universal custom to insert in a trust instrument containing a power of sale a provision that purchasers shall not be bound to see to the application of the purchase money."

Could Bush, the misappropriating trustee, claim protection under this article of the indenture, arguing that his endorsement

of the checks to the account of Inter Mundis "was executed in accordance with" the indentures, "binding upon all beneficiaries thereunder", and that he was "duly authorized and empowered to execute and deliver" them for deposit in the Inter Mundis account (quotations from article THIRTEENTH)? That would be absurd. Bush was a thief, and this article would be no protection to him. Can it be said that the endorsement of the checks was the "execution" of them? We doubt it. But even if it can, and even if article THIRTEENTH says that the execution was "conclusive evidence" of its propriety, here the actual evidence shows conclusively that such "execution" was not proper. (Stipulation ¶ 10 - A11). In this Court, which is to prevail, a provision intended to facilitate the trust administration and to protect a bona fide third person, or the actual facts? If article THIRTEENTH is no protection to Bush, how can it be to one who aids him, Citibank, which was on inquiry as to his misappropriation and knew nothing about that article? And so the Restatement, Trusts 2d states:

"§32. Misapplication of Payments Made to Trustee
If a third person pays or conveys to the trustee money or other property which the trustee as such is authorized to receive, and the trustee misapplies the money or other property, the third person is liable for participation in the breach of trust, if, but only

if, when he made such payment or conveyance he had notice that the trustee was misapplying or intending to misapply the money or other property.

* * *

"e. If a trustee in the proper exercise of a power of sale sells trust property, and the purchaser pays the purchase price with notice that the trustee intends to misapply the purchase price, and the trustee does misapply it, the purchaser is liable to the beneficiary for the amount of the purchase price. This is true even though it is provided in the trust instrument that the purchaser shall not be required to see to the application of the purchase money."

(underlining added.)

The same rule is, of course, applied where the law, even without such provision in the trust indenture, excuses a purchaser of trust property from the duty of seeing to the application of the proceeds. As stated in King v. Richardson, 136 F.2d 849, 864 (CCA 4th, 1943) cert.den. 320 U.S. 777 (1943):

"It is true that ordinarily a purchaser from a trustee is not required to look to the application of the purchase money to the purposes of the trust; but this rule has no application where the purchaser

knows at the time of purchase 'of the trustee's
violation of trust, committed or intended. '"

(Citing authorities.)

Citibank had a duty of inquiry here, and it was bound

"* * * by the information which it could have
obtained if an inquiry on its part had been pushed
until the truth had been ascertained." (Bischoff
v. Yorkville Bank, 218 N.Y. 106, 114 [1916])

Conclusion

The judgment appealed from should be modified as
requested in plaintiffs' main brief.

Respectfully submitted,

John M. Friedman

Attorney for Plaintiffs-Appellants

UNIFORM FIDUCIARIES ACT

§ 1. Definition of Terms.—(1) In this Act unless the context or subject-matter otherwise requires:

"Bank" includes any person or association of persons, whether incorporated or not, carrying on the business of banking.

"Fiduciary" includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust or estate.

"Person" includes a corporation, partnership, or other association, or two or more persons having a joint or common interest.

"Principal" includes any person to whom a fiduciary as such owes an obligation.

(2) A thing is done "in good faith" within the meaning of this Act, when it is in fact done honestly, whether it be done negligently or not.

§ 2. Application of Payments Made to Fiduciaries.—A person who in good faith pays or transfers to a fiduciary any money or other property which the fiduciary as such is authorized to receive, is not responsible for the proper application thereof by the fiduciary; and any right or title acquired from the fiduciary in consideration of such payment or transfer is not invalid in consequence of a misapplication by the fiduciary.

§ 3. Registration of Transfer of Securities Held by Fiduciaries.—If a fiduciary in whose name are registered any shares of stock, bonds or other securities of any corporation, public or private, or company or other association, or of any trust, transfers the same, such corporation or company or other association, or any of the managers of the trust, or its or their transfer agent, is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in making the transfer, or to see to the performance of the fiduciary obligation, and is liable for registering such transfer only where registration of the transfer is made with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making the transfer, or with knowledge of such facts that the action in registering the transfer amounts to bad faith.

§ 4. Transfer of Negotiable Instrument by Fiduciary.—If any negotiable instrument payable or indorsed to a fiduciary as such is indorsed by the fiduciary, or if any negotiable instrument payable or indorsed to his principal is indorsed by a fiduciary empowered to indorse such instrument on behalf of his principal, the indorsee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in indorsing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is transferred by the fiduciary in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is transferred in any transaction known by the transferee to be for the personal benefit of the fiduciary, the creditor or other transferee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in transferring the instrument.

§ 5. Check Drawn by Fiduciary Payable to Third Person.—If a check or other bill of exchange is drawn by a fiduciary as such, or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, the payee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in drawing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of or as security for a personal debt of the fiduciary

to the actual knowledge of the creditor, or is drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary, the creditor or other payee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the instrument.

§ 6. Check Drawn by and Payable to Fiduciary.—If a check or other bill of exchange is drawn by a fiduciary as such or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, payable to the fiduciary personally, or payable to a third person and by him transferred to the fiduciary, and is thereafter transferred by the fiduciary, whether in payment of a personal debt of the fiduciary or otherwise, the transferee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in transferring the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such facts that his action in taking the instrument amounts to bad faith.

§ 7. Deposit in Name of Fiduciary as Such.—If a deposit is made in a bank to the credit of a fiduciary as such, the bank is authorized to pay the amount of the deposit or any part thereof upon the check of the fiduciary, signed with the name in which such deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check.

§ 8. Deposit in Name of Principal.—If a check is drawn upon the account of his principal in a bank by a fiduciary who is empowered to draw checks upon his principal's account, the bank is authorized to pay such check without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check, or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check.

§ 9. Deposit in Fiduciary's Personal Account.—If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in his own name as fiduciary, or of checks payable to him as fiduciary, or of checks drawn by him upon an account in the name of his principal if he is empowered to draw checks thereon, or of checks payable to his principal and indorsed by him, if he is empowered to indorse such checks, or if he otherwise makes a deposit of funds held by him as fiduciary, the bank, receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such check, or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith.

§ 10. Deposit in Names of Two or More Trustees.—When a deposit is made in a bank in the name of two or more persons as trustees and a check is drawn upon the trust account by any trustee or trustees authorized by the other trustee or trustees to draw checks upon the trust account, neither the payee nor other holder nor the bank is bound to inquire whether it is a breach of trust to authorize such trustee or

UNIFORM FIDUCIARIES ACT

trustees to draw checks upon the trust account, and is not liable unless the circumstances be such that the action of the payee or other holder or the bank amounts to bad faith.

§ 11. *Act not Retroact.* e.—The provisions of this Act shall not apply to transactions taking place prior to the time when it takes effect.

§ 12. *Cases not Provided for in Act.*—In any case not provided for in this Act the rules of law and equity, including the law merchant and those rules of law and equity relating to trusts, agency, negotiable instruments and banking, shall continue to apply.

§ 13. *Uniformity of Interpretation.*—This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 14. *Short Title.*—This Act may be cited as the Uniform Fiduciaries Act.

§ 15. *Inconsistent Laws Repealed.*—All Acts or parts of Acts inconsistent with this Act are hereby repealed.

§ 16. *Time of Taking Effect.*—This Act shall take effect [].

CHAPTER 344

AN ACT to amend the general business law, in relation to registration of transfer of securities

Became a law May 17, 1937, with the approval of the Governor. Passed, three fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter twenty-five of the laws of nineteen hundred nine, entitled "An act relating to general business, constituting chapter twenty of the consolidated laws," is hereby amended by inserting therein a new article, to be article twenty-three-b, to read as follows:

ARTICLE 23-B

REGISTRATION OF TRANSFER OF SECURITIES TO OR BY FIDUCIARIES

Section 359-i. Definitions.

359-j. Registration of transfer of securities held by fiduciaries.

359-k. Registration of transfer of securities standing in name of deceased person or of minor, ward, or incompetent under guardianship or committee-ship, or of deceased or discharged trustee.

§ 359-i. Definitions. 1. In this article unless the context or subject matter otherwise requires:

"Fiduciary" includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust or estate.

"Person" includes a corporation, partnership, or other association, or two or more persons having a joint or common interest.

2. An act is done "in good faith" when it is done in fact honestly, whether it be done negligently or not.

§ 359-j. Registration of transfer of securities held by fiduciaries. If a fiduciary in whose name are registered any shares of stock, bonds or other securities of any corporation, public or private, or company or other association, or of any trust, transfers the same, such corporation or company or other association, or any of the managers of the trust, or its or their transfer agent, is not bound to inquire whether the fiduciary is committing a breach of his or its obligation as fiduciary in making the transfer, or to see to the performance of the fiduciary obligation, and is liable for registering such transfer only when registration of the transfer is made with actual knowledge that the fiduciary is committing a breach of his or its obligation as fiduciary in making the transfer, or with

knowledge of such facts that the action in registering the transfer amounts to bad faith.

§ 359-k. Registration of transfer of securities standing in name of deceased person or of minor, ward, or incompetent under guardianship or committee ship, or of deceased or discharged trustee. If any shares of stock, bonds or other securities of any corporation, public or private, or company or other association, or of any trust, standing in the name of a deceased person or of a minor, ward, or incompetent, or of a deceased or discharged trustee or other fiduciary, be presented for transfer, accompanied by valid and unrevoked letters testamentary or of administration, letters of guardianship, or certificate evidencing the grant thereof, or decree, order of court or other document appointing or certificate evidencing the appointment of a guardian, committee, substituted trustee, or other fiduciary, as the case may be, duly issued by a court of competent jurisdiction, or certified copy thereof, together with such other instrument or order of court or certified copy thereof as may be required under the law governing transfer of such security to authorize such transfer, the corporation or company or other association, or any of the managers of the trust, or its or their transfer agent, shall be justified in registering the transfer to the executor, administrator, guardian, committee, substituted trustee, or other fiduciary, or at his or its order, and shall not be bound to inquire whether such executor, administrator, guardian, committee, substituted trustee, or other fiduciary, is committing a breach of his or its obligation as fiduciary in making the transfer, or to see to the performance of the fiduciary obligation, and is liable for registering such transfer only when registration of the transfer is made with actual knowledge that the executor, administrator, guardian, committee, substituted trustee, or other fiduciary, is committing a breach of his or its obligation as fiduciary in making the transfer, or with knowledge of such facts that the action in registering the transfer amounts to bad faith; provided, however, that nothing herein contained shall be construed to affect any obligation with respect to collection of estate, inheritance or other taxes, imposed on the corporation, company, association, or managers of the trust, or its or their transfer agent.

§ 2. This act shall take effect immediately.

§ 359-1

GENERAL BUSINESS LAW

Art. 23-B

§ 359-1. Deposit of moneys by fiduciary

If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account against which he is empowered to sign as a fiduciary, or of checks drawn by him upon an account in the name of his principal if he is empowered to draw checks thereon, the bank receiving such deposit may assume, if acting in good faith and without actual knowledge to the contrary, that the funds so deposited by the fiduciary are funds to which the fiduciary is personally entitled. Nothing contained in this section shall be deemed to modify or otherwise affect any provision of section ninety-five of the negotiable instruments law nor to relieve such bank from any liability imposed upon it by law to the extent of any payment or amount which such bank may receive for its benefit from any withdrawal or application of such funds so deposited. Added L.1948, c. 866, § 3, eff. April 6, 1948.

STATE OF NEW YORK

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COMMISSION ON UNIFORM STATE LAWS

April 22, 1937

Honorable Herbert Lehman
Capitol
Albany, New York

Dear Governor Lehman:

As a Commissioner on Uniform State Laws I am writing to urge your approval of Senate bill, Introductory No. 235, Print No. 841 and 930, to amend the General Business Law in relation to the registration of transfer of securities.

My interest in the bill is due to the fact that it incorporates the principle of sections from the Uniform Fiduciaries Act, drafted and recommended by the National Conference of Commissioners on Uniform State Laws. I have been anxious to see the entire Uniform Act adopted in this state, and I am particularly desirous of having this portion of that Uniform Act become law in New York.

I understand that the Law Revision Commission has placed before you a detailed memorandum explaining and supporting the provisions of the present bill. It is, therefore, unnecessary for me to make any extended argument in its support. I wish, however, to emphasize that the Uniform Fiduciaries Act in its entirety was based upon the principle that persons dealing with fiduciaries should not be charged with constructive notice

Honorable Herbert H. Lehman

-2-

April 22, 1937

that certain acts of the fiduciaries are breaches of trust; that, in the ordinary course of banking and commercial transactions, it is not practicable to make inquiries into the conduct of fiduciaries; and that persons dealing with fiduciaries should not be bound to inquire into their trust relationship and supervise them in the performance of their duties. The requirement of such inquiries seriously hampers honest fiduciaries in the performance of their obligations, and causes delay and expense which is ultimately borne by the beneficiaries themselves.

May I call your attention, also, to the fact that the Uniform Fiduciaries Act had, by 1935, been adopted in sixteen states and that provisions similar to Section 359-j of the present bill have been enacted in several states, viz. Delaware, Illinois, Kentucky, Maryland, Massachusetts, Ohio and Pennsylvania? There is also a similar statutory provision in England.

I am taking the liberty of enclosing two pages from a memorandum prepared by me in 1930 when the entire Fiduciaries Act was before the Legislature.

It is well known that the risk which the present law throws upon corporations and their transfer agents hampers the ready transferability of shares standing in the names of fiduciaries and that to avoid the consequent embarrassment, fiduciaries have sometimes resorted to the practice of having shares stand in the name of a nominee without disclosing the fiduciary character of the holding. It seems far wiser to relieve corporations of an unjust risk rather than to encourage technical evasion of the present law by trustees.

Respectfully yours,

Wm. H. Davis

RSS:FEE
Enc.

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OCT 21 1975
LUNNEY & CROCCO
ATTORNEYS FOR FNCB